



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 30, 2023

IN THE MATTER OF:

Appeal Board No. 628551

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective October 8, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by TOMPKINS COMMUNITY ACTION prior to October 8, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 17, 2023 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

FINDINGS OF FACT: The claimant worked for a non-profit organization as a full-time manager for less than three months until October 7, 2022. He was aware of the employer's sexual harassment policy, which prohibits behavior that is "not welcome, personally offensive, fails to respect to respect the rights of others, and lowers morale and therefore interferes with work effectiveness." It adds that sexual harassment can consist of "unwelcome sexual advances, requests for sexual favors, display of derogatory posters, cartoons and drawings, or other physical or verbal conduct of a sexual nature" that will result in disciplinary action up to, and including, termination of employment. The claimant also received sexual harassment training at hire. As a manager, he was held to a higher standard in regard to upholding the

employer's policies.

The claimant supervised a certain employee, BNA. On October 7, 2022, the claimant sent a message via Facebook to BNA's cousin, in which he asked the cousin if BNA was "repulsed" by the claimant. The claimant explained that he was the manager at the center where BNA now worked and that BNA was "an amazing teacher." He then stated "we had a Zoom [meeting] a few weeks ago... When I came into the video chat she smiled....eyes softened...she played with her hair lol."

The cousin sent a screenshot of the claimant's message to BNA. The next day, BNA complained to the employer about the message, stating that it made her feel unsafe and uncomfortable. She added that she found the claimant's conduct "creepy." The employer suspended the claimant's employment while it investigated the incident. On October 18, 2022, the employer discharged the claimant for sending the message in question, determining that his actions violated its sexual harassment policy. The claimant had no prior warnings for similar conduct.

OPINION: Pursuant to Labor Law § 593 (3), a claimant is disqualified from

receiving benefits after having lost employment through misconduct in connection with that employment. Pursuant to Labor Law § 527, the wages paid

in such employment cannot be used to establish a future claim for benefits.

The credible evidence establishes that the claimant was discharged after the employer determined that he had violated its sexual harassment policy when he sent a Facebook message to a subordinate's cousin, in which he asked whether the subordinate was interested in him. We find that the message clearly reflects the claimant's desire to know whether the subordinate had romantic feelings for him, despite the claimant's contentions to the contrary; we further find that the claimant was aware of the employer's policy prohibiting sexual harassment.

However, we disagree with the Administrative Law Judge that the claimant's actions violated the policy. We note that the claimant did not directly contact the subordinate but merely communicated with a third party with no known connection to the employer. He also did not ask that party to take any action on his behalf to advance a personal relationship with the subordinate.

It is significant that the employer's policy contains no provision advising the claimant that this specific conduct falls within the scope of prohibited behavior and that he had not been warned about similar conduct. Under these circumstances, we find that the claimant's actions were the result of mere poor judgment. While it was the employer's prerogative to discharge the claimant, poor judgment is not misconduct for unemployment insurance purposes. Accordingly, we conclude that the claimant's employment ended under nondisqualifying circumstances; he therefore is allowed benefits.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER